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SEP 30 2011

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIAPOSTED ON WEBSITE
NOT FOR PUBLICATIONUNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)	Case No. 06-22225-D-7
BETSEY WARREN LEBBOS,)	
)	
Debtor.)	
_____)	
LINDA SCHUETTE,)	Adv. Pro. No. 11-2386-D
)	
Plaintiff,)	Docket Control No. MPD-1
v.)	
JOSEPH GIOVANAZZI as trustee,)	DATE: August 31, 2011
)	TIME: 10:00 a.m.
Defendant.)	DEPT: D
_____)	

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or Issue preclusion.

MEMORANDUM DECISION

Plaintiff Linda Schuette, the trustee in the chapter 7¹ case in which this adversary proceeding is pending (the "trustee"), seeks partial summary judgment against defendant Joseph Giovanazzi, as trustee of the Aida Madeleine Lebbos No. 2 Trust and of the Aida Madeline Lebbos Trust II ("Giovanazzi"). Giovanazzi opposes the motion. For the reasons set forth below, the court will grant the motion.

1. Unless otherwise indicated, all Code, chapter, and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All Rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

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1 I. BACKGROUND

2 A. Adversary No. 07-2006

3 On January 3, 2007, the plaintiff filed a complaint seeking
4 to set aside alleged fraudulent transfers of a condominium in
5 Long Beach, California (the "condo" or the "property"), to
6 recover property and/or monetary damages, for turnover of
7 property, and for declaratory relief, Adv. No. 07-2006. The
8 defendants were the debtor in the underlying chapter 7 case,
9 Betsey Warren Lebbos, individually and as a trustee of the Aida
10 Madeleine Lebbos No. 2 Trust and as a trustee of the Aida
11 Madeline Lebbos Trust II ("Lebbos"), and Jason Gold and Thomas
12 Carter, as co-trustees of the Aida Madeleine Lebbos No. 2 Trust
13 and as co-trustees of the Aida Madeline Lebbos Trust II ("Gold"
14 and "Carter").²

15 On February 5, 2007, Lebbos filed motions to dismiss the
16 proceeding and to transfer the venue of the proceeding to the
17 Central District of California, and on February 28, 2007, Lebbos
18 filed a request to disqualify the undersigned as the judge in the
19 proceeding. Those motions were denied. On August 17, 2007, Gold
20 and Carter filed motions to dismiss and to transfer venue and a
21 request to disqualify the undersigned, and Lebbos filed second
22 motions to dismiss and to transfer venue. On September 6, 2007,

23 _____
24 2. During the long history of Lebbos' chapter 7 case, the
25 parties have used both of these names for the trust. Lebbos, for
26 example, filed an answer in Adv. No. 07-2006 in which she
27 referred to the Aida Madeline Lebbos Trust No. II as non-
28 existent, yet the grant deed by which she purported to convey the
property to Gold and Carter, as trustees, refers solely to the
Aida Madeline Lebbos Trust II. The parties have not raised this
discrepancy as an issue; for ease of reference here, the court
will refer to the "Trust."

1 Lebbos filed a second request for disqualification. The motions
2 were denied. At least two appeals were taken by each of the
3 defendants.

4 On November 28, 2007, Schuette filed motions against all
5 three defendants for orders imposing sanctions against them,
6 including striking their answers and entering their defaults for
7 failure to appear at depositions and failure to produce
8 documents. All three defendants opposed the motions. On
9 February 13, 20, and 21, 2008, the court issued lengthy
10 memorandum decisions explaining its reasons for granting the
11 motions as to each defendant. On February 22, 2008, Lebbos filed
12 a notice of appeal, and on March 3, 2008, Gold and Carter
13 appealed. Lebbos and Gold filed motions for a stay pending
14 appeal and Carter filed a joinder to Gold's motion. The motions
15 were denied.

16 On March 11, 2008, the trustee filed an application, based
17 on the order entering their defaults, for a default judgment
18 against all three defendants. On March 26, 2008, Lebbos filed a
19 third request for disqualification of the undersigned, along with
20 opposition to the application for default judgment, and the same
21 day, Gold and Carter filed joinders in Lebbos' opposition.

22 Hearing on the trustee's application was scheduled for April
23 9, 2008, and was continued by the court to April 15, 2008. At
24 the request of attorney John Read, who had by then made several
25 special appearances on behalf of Lebbos in the chapter 7 case and
26 the various adversary proceedings, the court continued the
27 hearing to April 17, 2008. A hearing was held that day, at which
28 Gold appeared and attorney John Read made a special appearance

1 for Lebbos. The same day, this court issued findings of fact and
2 conclusions of law on the plaintiff's application for default
3 judgment against all the defendants, along with a judgment
4 against all of them (the "Judgment"), further described below.

5 Three days earlier, on April 14, 2008, Gold and Carter,
6 having by that time participated heavily in the adversary
7 proceeding, including seeking to have it dismissed, to have the
8 venue changed, and to have this judge disqualified; having
9 appealed the decisions against them; having thrown up unrelenting
10 roadblocks to the trustee's discovery efforts; knowing full well
11 that their defaults had been entered over their objections; and
12 knowing full well of the hearing on the trustee's motion for
13 default judgment -- at that time, scheduled for the very next
14 day, signed and caused to be recorded a quitclaim deed purporting
15 to transfer the condo to Giovanazzi, as trustee of the Aida
16 Madeline Lebbos Trust II (the "Quitclaim Deed"). The Quitclaim
17 Deed reflects a documentary transfer tax of \$0.

18 On August 13, 2008, Giovanazzi, as trustor, signed a deed of
19 trust purporting to encumber the condo in favor of Aida Madeleine
20 Lebbos, Cameron Dacquila, and Brandon Dacquila, to secure an
21 obligation of \$750,000 (the "Deed of Trust"). The beneficiaries
22 are, respectively, Lebbos' daughter and grandchildren. (The same
23 individuals are also, apparently, the beneficiaries of the
24 Trust.) The Deed of Trust was recorded on September 19, 2008.
25 On August 27, 2008, Giovanazzi filed an unlawful detainer action
26 claiming to be the owner of the property and seeking possession
27 (the "Unlawful Detainer Action").

28 / / /

1 As pertinent to this motion, the Judgment determined that:

2 • The transfer of the condo from Lebbos, an unmarried woman,
3 to Lebbos as trustee of the Trust, on or about August 19, 2004,
4 is set aside and avoided and is of no force or effect;

5 • The transfer of the condo from Lebbos as trustee of the
6 Trust to Gold and Carter as trustees of the Trust, on or about
7 May 25, 2005, is set aside and avoided and is of no force or
8 effect;

9 • Recovery of all right, title, and interest in and to the
10 condo held by Lebbos, Gold, and Carter, in any capacity, is
11 awarded to the trustee, and the interest of the trustee in the
12 condo is superior to any interest of Lebbos, Gold, and Carter,
13 and each of them, in the condo.

14 The Judgment also granted immediate access to, control over,
15 and possession of the condo to the trustee, and permanently
16 enjoined Lebbos, Gold, and Carter from conveying, transferring,
17 encumbering, or otherwise affecting the title to or encumbrances
18 on the condo. As seen above, three days earlier, unknown to the
19 trustee, Gold and Carter had signed and recorded the Quitclaim
20 Deed in favor of Giovanazzi.

21 B. Prior Role of Giovanazzi

22 At the time he was named on the Quitclaim Deed, Giovanazzi
23 was no stranger to Lebbos' bankruptcy case. On January 2, 2008,
24 he had filed two declarations in the case -- one in support of
25 Lebbos' motion to terminate the services of the chapter 7
26 trustee, the other objecting to the trustee's settlement of a
27 federal district court action brought by Lebbos in 2002.

28 Giovanazzi testified he was the attorney of record for Lebbos in

1 a \$5 to \$20 million lawsuit then pending in the Los Angeles
2 County Superior Court in which Lebbos was suing some former
3 attorneys of hers for fraud; he referred to overwhelming evidence
4 of fraud on the part of those attorneys; he accused the trustee
5 and her attorney of fraud and deceit because they had compromised
6 the claims asserted in that lawsuit (claims that were clearly
7 property of the bankruptcy estate); and he stated he had advised
8 the Los Angeles County Superior Court judge that he might be
9 requesting the court to issue or approve arrest warrants for the
10 trustee and her attorney.

11 C. The Complaint in this Adversary Proceeding

12 In the first and third causes of action of this new
13 adversary proceeding, which are the subject of this motion, the
14 trustee alleges that:

15 • The legal effect of the Judgment is that the two avoided
16 transfers of title are preserved for the benefit of the estate
17 under § 551;

18 • The transfer evidenced by the Quitclaim Deed is of no
19 force and effect as to the estate and the trustee's interest in
20 the condo; it is void and a nullity and does not grant or create
21 any interest in the condo in favor of Giovanazzi;

22 • The transfer evidenced by the Deed of Trust is of no force
23 and effect as to the estate and the trustee's interest in the
24 condo; it is void and a nullity and does not grant or create any
25 interest in the condo in favor of Giovanazzi, Aida Madeleine
26 Lebbos, Cameron Dacquila, or Brandon Dacquila;

27 • The Unlawful Detainer Action is of no force and effect as
28 to the estate and the trustee's interest in the condo; it is void

1 and a nullity, and does not grant, create, establish, or
2 recognize any interest in the condo in favor of Giovanazzi.

3 II. ANALYSIS

4 This court has jurisdiction over the motion pursuant to 28
5 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding
6 under 28 U.S.C. § 157 (b)(2)(A), (H) & (O). The Motion was
7 brought pursuant to Fed. R. Civ. P. 56(a), made applicable herein
8 by Fed. R. Bankr. P. 7056.

9 A. Standards for Determining Motion for Summary Judgment

10 Where a motion for summary judgment is before the court, the
11 court is to render judgment for the moving party where he or she
12 shows that "there is no genuine dispute as to any material fact
13 and the movant is entitled to judgment as a matter of law." Fed.
14 R. Civ. P. 56(a). The moving party bears the burden of producing
15 evidence showing there is no genuine issue of material fact and
16 that he or she is entitled to judgment as a matter of law.

17 Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552
18 (1986).

19 Once the moving party has met his or her initial burden, the
20 non-moving party must set forth specific facts, through
21 affirmative evidence, showing that there is a genuine issue of
22 fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
23 256-57 (1986).

24 B. The Statute of Limitations

25 Giovanazzi contends, first, that the trustee's complaint is
26 barred by the one-year statute of limitations of § 550(f) because
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1 it was not filed within one year after entry of the Judgment.³
2 The trustee argues in response that she is not seeking any remedy
3 under § 550, but only under § 551, which provides that a transfer
4 avoided under, for example, § 548 (as in this case) is preserved
5 for the benefit of the estate. Further, any interest in property
6 preserved for the benefit of the estate under § 551 is
7 automatically brought into the estate under § 541(a)(4).

8 As to avoidable transfers under, for example, § 544, §547,
9 or § 548, there is a distinction to be made between avoidance and
10 recovery. "Congress dealt separately with the concepts of
11 avoidance and recovery in a number of ways." Eisen v. Allied
12 Bancshares Mortg. Corp. LLC (In re Priest), 268 B.R. 135, 138
13 (Bankr. N.D. Ohio 2000). Thus, "avoidance and recovery are
14 independent remedies," and a trustee is not required to seek
15 recovery under § 550 if avoidance is an adequate remedy. Id.;
16 see also Suhar v. Burns (In re Burns), 322 F.3d 421 (6th Cir.
17 2003) ["avoidance and recovery are distinct concepts and
18 processes."].

19 The trustee's position is that avoidance under § 548,
20 together with preservation under § 551 and § 541(a)(4), provides
21 an adequate remedy to the estate, and therefore, § 550 and its
22 remedies and restrictions, such as the statute of limitations in
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25 3. Section 550(a) provides that to the extent a transfer is
26 avoided as, for example, a fraudulent transfer, the trustee may
27 recover the property transferred or, if the court so orders, the
28 value of the property, for the benefit of the estate. Under §
550(f), an action under § 550 must be brought within one year
after the avoidance of the transfer on account of which recovery
under § 550 is sought or the time the case is closed, whichever
is earlier.

1 \$ 550(f), are simply not in play here.⁴ She notes that
2 ordinarily, when a trustee has succeeded in avoiding a transfer,
3 "\$ 551 provides the default remedy," with a trustee having the
4 discretion to seek an alternative remedy of recovery under \$ 550.
5 USAA Fed. Sav. Bank v. Thacker (In re Taylor), 599 F.3d 880, 890
6 (9th Cir. 2010), citing Rodriguez v. Daimlerchrysler Fin. Servs.
7 Am. LLC (In re Bremer), 408 B.R. 355, 359 (10th Cir. BAP 2009)
8 ("Preservation is automatic, while recovery is not. Recovery is
9 necessary only when the remedy of avoidance, and therefore of
10 preservation, is inadequate.").

11 There is a simpler answer; namely, that the trustee obtained
12 the relief available under \$ 550 at the same time as he avoided
13 the transfers, and there was no need for a further action under \$
14 550. Specifically, in addition to avoiding the transfers by
15 which Gold and Carter as trustees of the Trust ended up with
16 title to the condo, the Judgment also provided that recovery of
17 all right, title, and interest in and to the condo held by
18 Lebbos, Gold, and Carter, in any capacity, is awarded to the
19 trustee, and the interest of the trustee is superior to any
20 interest of Lebbos, Gold, and Carter, and each of them, in the
21 condo.

22 In other words, by way of the Judgment, which has been
23 affirmed by the district court and the Ninth Circuit Court of
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25 4. Courts have held that where avoidance is an adequate
26 remedy, the trustee is not required to pursue recovery under \$
27 550, and the defenses afforded transferees under \$ 550(c) (non-
28 insider transferee) and \$ 550(e) (good faith transferee) are not
available. Burns, 322 F.3d at 429; Priest, 268 B.R. at 139 (\$
550(e)); Roost v. Associates Home Equity Servs., Inc. (In re
Williams), 234 B.R. 801, 805 (Bankr. D. Or. 1999) (\$ 550(c)).

1 Appeals and which is now final, the trustee accomplished both
2 avoidance and recovery, and there was no need for further action
3 on the part of the trustee to "recover" the "avoided" transfers.⁵
4 Thus, § 550(f) is irrelevant. As a result of the Judgment, the
5 effectiveness of which relates back to March 14, 2007, as seen
6 below, at the time Gold and Carter signed and recorded the
7 Quitclaim Deed, they had no interest to convey, and at the time
8 Giovanazzi signed and recorded the Deed of Trust, he had no
9 interest to convey.

10 C. The Notice of Lis Pendens

11 The fact that Gold and Carter managed to sign and record the
12 Quitclaim Deed immediately before this court entered the Judgment
13 does not defeat the trustee's rights because the Judgment relates
14 back to the date the trustee recorded her notice of lis pendens,
15 March 14, 2007.

16 From the time of recording the notice of pendency of
17 action, a purchaser, encumbrancer, or other transferee
18 of the real property described in the notice shall be
19 deemed to have constructive notice of the pendency of
20 the noticed action as it relates to the real property
21 and only of its pendency against parties not
fictitiously named. The rights and interest of the
claimant in the property, as ultimately determined in
the pending noticed action, shall relate back to the
date of the recording of the notice.

22 Cal. Code Civ. Proc. § 405.24. Thus, Giovanazzi, to the extent,
23 if any, he may be deemed a "purchaser" or "transferee" by virtue
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27 5. See Lippi v. City Bank, 955 F.2d 599, 605 (9th Cir.
28 1992) [it is customary practice to file a consolidated action to
avoid a transfer and to recover it or its value].

1 of the Quitclaim Deed,⁶ and Aida Madeleine Lebbos, Cameron
2 Dacquila, and Brandon Dacquila, as encumbrancers, are deemed to
3 have had constructive notice of the pendency of Adv. No. 07-2006.
4 And the trustee's rights and interests, as determined by the
5 Judgment, relate back to the date the lis pendens was recorded,
6 which predated both the Quitclaim Deed and the Deed of Trust.

7 Further,

8 [e]very conveyance of real property or an estate for
9 years therein, other than a lease for a term not
10 exceeding one year, is void as against any subsequent
11 purchaser or mortgagee of the same property, or any
12 part thereof, in good faith and for a valuable
consideration, whose conveyance is first duly recorded,
and as against any judgment affecting the title, unless
the conveyance shall have been duly recorded prior to
the record of notice of action.

13 Cal. Civ. Code § 1214. In other words, "a subsequent purchaser
14 cannot acquire an interest in property superior to the interest
15 of a party that has filed a lis pendens." In re Lane, 980 F.2d
16 601, 605 (9th Cir. 1992). As a result, the trustee's Judgment
17 prevails over any purchaser or mortgagee acquiring an interest
18 after March 14, 2007. As the Quitclaim Deed and the Deed of
19 Trust were recorded well after that date, the rights as
20 determined by the Judgment prevail.

21 Giovanazzi contends, however, that the lis pendens is void
22 for a host of technical reasons -- failure to serve by certified
23 mail, failure to serve to all known addresses of the parties and
24 owners of record, failure to record a declaration of no known
25 addresses for "secondary owners" Aida Madeleine Lebbos, Cameron

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27 6. The court questions whether the Quitclaim Deed actually
28 effectuated a transfer as it was merely from two individuals as
trustees of the Trust to a third as trustee of the Trust.

1 Dacquila, and Brandice Dacquila, and failure to file a copy of
2 the lis pendens in the adversary proceeding. Giovanazzi cites
3 Cal. Code Civ. Proc. § 405.22, which identifies some of these as
4 requirements for the recording of a lis pendens, and § 405.23,
5 which provides,

6 Any notice of pendency of action shall be void and
7 invalid as to any adverse party or owner of record
8 unless the requirements of Section 405.22 are met for
9 that party or owner and a proof of service in the form
and content specified in Section 1013a has been
recorded with the notice of pendency of action.

10 There is case law supporting the conclusion that a lis
11 pendens that does not comply with these requirements may be
12 expunged. Orcilla v. Bank of Am., N.A., 2011 U.S. Dist. LEXIS
13 36753, *7 (N.D. Cal. March 25, 2011); Hutson v. Am. Home Mortg.
14 Servicing, 2009 U.S. Dist. LEXIS 96764, *47 (N.D. Cal. 2009);
15 McKnight v. Superior Court, 170 Cal. App. 3d 291, 303 (1985). On
16 the other hand, Giovanazzi has cited no authority, and the court
17 is aware of none, for the proposition that a lis pendens that is
18 not in compliance with all the requirements of § 405.22 does not
19 provide constructive notice to subsequent purchasers and lienors.

20 In this case, the lis pendens contained the names of Lebbos,
21 Gold, and Carter, as trustees of the Trust; it contained the
22 legal description of the property; and it was recorded in the
23 county in which the property is located.⁷ None of the alleged
24 deficiencies in the lis pendens would have any effect on the
25 notice it provided to the public, and they did not impair the

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27 7. The court cannot discern any basis for Giovanazzi's
28 contention that the lis pendens "was not filed on the property
involved in this case." Opposition to Motion to Partial Summary
Judgment, filed August 16, 2011 ("Opposition"), 3:15-16.

1 effectiveness of the lis pendens in achieving its purpose.⁸

2 Thus, the court concludes that any potential purchaser or lienor
3 was on constructive notice of the pendency of the adversary
4 proceeding, and under § 405.24, the rights established by the
5 Judgment relate back to the date the lis pendens was recorded.

6 D. Effect of the Judgment on the "Unsued Owners"

7 Under this heading, Giovanazzi contends, first, that there
8 is nothing to be "preserved" under § 551 because by the time the
9 Judgment was entered, Gold and Carter had no legal or beneficial
10 ownership interest in the property. "All that is preserved is
11 nothing as the defendants in case no. 07-2006 had nothing." This
12 argument overlooks the fact that the Judgment effectuated the
13 avoidance of the transfer by which Gold and Carter had acquired
14 the property and awarded recovery to the trustee, determining
15 that her interest in the property was superior to theirs. The
16 effect of the Judgment related back to the recordation of the lis
17 pendens; thus, at the time Gold and Carter purported to convey
18 the property to Giovanazzi, they had nothing to convey.

19 The effect of the Judgment was that, effective March 14,
20 2007, the trustee stepped into the shoes of Gold and Carter and
21 succeeded to their rights in the property. "Under section 551

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23 8. The purpose of a lis pendens is to give
24 constructive notice of an action affecting
25 real property to persons who subsequently
26 acquire an interest in that property, so that
27 the judgment in the action will be binding on
such persons even if they acquire their
interest before the judgment is actually
rendered.

28 Palmer v. Zaklama, 109 Cal. App. 4th 1367, 1375 (2003), citing
Bishop Creek Lodge v. Scira, 46 Cal.App.4th 1721, 1733 (1996).

1 the trustee succeeds to such rights as he may defeat in the hands
2 of the transferee of an avoided transfer." In re Vermont
3 Fiberglass, Inc., 44 B.R. 505, 511 (Bankr. D. Vt. 1984), citing
4 House Report No. 595, 95th Cong., 1st Sess. 376 (1977) and 124
5 Cong. Rec. H 11,097 (daily ed. Sept. 28, 1978); Senate Report No.
6 989, 98th Cong., 2d Sess. 91 (1978); see also Van de Kamp's Dutch
7 Bakeries, 908 F.2d 517, 519 (9th Cir. 1990) ["[A] trustee who
8 avoids an interest succeeds to the priority that interest enjoyed
9 over competing interests."].

10 Next, Giovanazzi argues that as to him, Aida Lebbos,
11 Brandice Dacquila, and Cameron Dacquila, the Judgment "has no
12 effect," as they "were never given any notice or opportunity to
13 appear and defend their ownership."⁹ On the contrary, despite
14 appeals to the district court and Ninth Circuit Court of Appeals,
15 as well as a petition for writ of certiorari to the U.S. Supreme
16 Court, the Judgment is final, and it binds all parties claiming
17 an interest adverse to that of the trustee.

18 E. The Denial of Discharge

19 Finally, Giovanazzi claims that "since there has been a
20 denial of discharge, there are no creditors to benefit- just the
21 plaintiff and her lawyer and their pocketbooks."¹⁰ He also
22 contends there is no longer a bankruptcy estate. This represents
23 a complete misunderstanding of bankruptcy law. That Lebbos has
24 been denied a bankruptcy discharge has nothing to do with the
25 continuing existence of the bankruptcy estate, with claims

27 9. Opposition, 9:2-5.


28 10. Id., 10:6-7.

1 against the estate, or with the trustee's power and duty to
2 continue to liquidate property of the estate for the benefit of
3 creditors.

4 III. CONCLUSION

5 For the reasons stated, the court concludes that the trustee
6 has met her burden of producing evidence showing there is no
7 genuine issue of material fact and that she is entitled to
8 judgment as a matter of law, and Giovanazzi has failed to
9 demonstrate the existence of genuine issues of fact for trial.
10 Thus, the court will grant the trustee's motion.

11 Dated: September 30, 2011



12 ROBERT S. BARDWIL
13 United States Bankruptcy Judge
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